Supreme Court, U.S.
FILED
AUG 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SEQUOIA BOOKS, INC.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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Printed by Authority of the State of Illinois (P.O. 33780—50—8-19-87)

QUESTIONS PRESENTED FOR REVIEW

Whether petitioner stated a question worthy of review by this Court.

A. Whether the circumstances surrounding the search warrant merit intervention by this Court.

B. Whether there is any conflict between the First and Ninth Circuits and the Illinois Appellate Court.

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REASONS FOR DENYING THE WRIT

PETITIONER DOES NOT STATE A QUESTION WORTHY OF REVIEW BY THIS COURT

A. The Circumstances Surrounding The Search Warrant Do Not Merit Intervention By This Court.

Petitioner seeks review of the decision of the Illinois Appellate Court on the grounds that that decision was erroneous and improper. Petitioner's three reasons for this alleged error relate to the issuance of the search warrant: 1) the issuing judge improperly determined probable cause,

2) an adversary hearing prior to seizure should have been granted because the seizure under this warrant, which did not limit the number of magazines to be confiscated, constituted prior restraint, 3) the search warrant was overly broad, constituting a constitutionally invalid general warrant.

These issues do not call for the attention of this Court because this Court has clearly and conclusively formulated the relevant aspects of the search and seizure and obscenity doctrines. Regarding the probable cause and prior restraint issues, this Court recently reiterated the relevant aspects of the two doctrines in *New York v. P.J. Video, Inc.*, ____ U.S. ____, 106 S.Ct. 1610 (1986). *P.J. Video* and the case law it follows fully address and are fully dispositive of these two issues. Also, this Court has developed case law fully controlling the general warrant issue through a line of cases beginning with *Marcus v. Search Warrant*, 367 U.S. 717 (1961) and *Stanford v. Texas*, 379 U.S. 476 (1965). Therefore, the granting of this petition would not serve to develop, clarify, or modify the already well-established law in this area. This Court thought it proper to deny certiorari when this petitioner raised these same issues on three recent occasions. *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984); *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987); *People v. Sequoia Books, Inc.*, 146 Ill. App. 3d 1, 496 N.E.2d 740 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987).

In *P.J. Video* in its discussion of the proper probable cause standard, this Court stated that

> That standard was recently set forth by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983) . . . "The task of the issuing magistrate is simply to make a

> practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place . . . *Id.*, at 235, 238-239. . . . probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." 462 U.S., at 244, n. 13.

106 S.Ct. 1610, at 1615, 1616. In the case at bar, the Illinois Appellate Court applied two of its prior decisions' discussions of the proper probable cause standard. *People v. Sequoia Books, Inc.*, 150 Ill. App. 3d 211, 501 N.E. 2d 856 (2nd Dist. 1986). In *People v. Patroff*, 141 Ill. App. 3d 483, 490 N.E.2d 148 (2nd Dist. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 251 (1987), *U.S. appeal filed*, decided two months before *P.J. Video*, the appellate court utilized a "common sense and . . . practical consideration test" identical to the "practical, common-sense" standard of *Gates* and *P.J. Video*. 141 Ill. App. 3d at 487, 490 N.E.2d at 151; 462 U.S. at 238; 106 S.Ct. at 1615. In *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987), the appellate court cited *P.J. Video* for the probability and "totality of the circumstances" standard. 145 Ill. App. 3d at ____, 495 N.E.2d at 1296. Thus, since the Illinois Appellate Court applied the same probable cause standard in this case as this Court requires under *P.J. Video*, granting certiorari in this case would only serve to rehash the principles of *P.J. Video* and to review alleged errors in this cause alone. Therefore, certiorari should be denied.

Petitioner is barred from making its prior restraint argument before this Court because Petitioner did not make that argument on appeal below. *Street v. New York*, 394 U.S. 575 (1969), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987). In *Rotary Club* this Court stated that

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S.Ct. 1889, 1891-1892, 68 L.Ed.2d 392 (1981).

107 S.Ct. at 1948. In the case at bar, Petitioner did not argue on appeal, and the Illinois Appeliate Court did not discuss, prior restraint or judicial hearings prior to seizure. Therefore, Petitioner cannot bring this argument before this Court.

If Petitioner had made its prior restraint argument on appeal, reason to grant certiorari would still be lacking because this Court in *P.J. Video* reaffirmed speech-related prior restraint principles that have been clearly and conclusively established by a long line of cases and that are dispositive of Petitioner's claim. 106 S.Ct. at 1614, 1615. *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Heller v. New York*, 413 U.S. 483 (1973). In *Helier*, this Court distinguished the situation in which

> . . . the seizure of large quantities of books [is] for the sole purpose of their destruction, . . . this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required . . . *Quantity of Copies of Books v. Kansas, supra*, 378 U.S., at 213, 84 S.Ct., at 1727 (1964).

413 U.S. at 491. However, this Court also stated that

> But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding . . .

413 U.S. at 492. In the case at bar the situation is one of preservation of evidence and not one of destruction or blocking distribution because "the officers took only one copy of any single magazine." *People v. Sequoia Books, Inc.*, 150 Ill. App. 3d 211 at ____, 501 N.E.2d 856 at 857 (2nd Dist. 1986). Petitioner argues at page 7 of his petition that an evidence-gathering claim is not possible because only three out of 139 magazines seized were the subject of trial. However, Petitioner misstates the record. The jury found each of the 139 magazines to be obscene. *People v. Sequoia Books, Inc.*, 150 Ill. App. 3d 211, at ____, 501 N.E.2d 856, at 858 (2nd Dist. 1986). Thus, since the prior restraint principles of the above-mentioned line of cases are directly and conclusively dispositive of this issue in this case, this Court should deny certiorari. Indeed, certiorari would serve only to rehash the principles reaffirmed in *P.J. Video* and to correct alleged errors in the instant case alone.

Petitioner's general warrant claim is equally unworthy of review by this Court. Beginning with *Marron v. United States*, 275 U.S. 192 (1927) this Court established in a long line of cases a definitive rule for dealing with the general warrant issue. *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Stanford v. Texas*, 379 U.S. 476 (1965); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Maryland v. Macon*, 472 U.S. 463 (1985). These several decisions show that this Court's general warrants rule requires that the warrant leave no discretion to the officer to choose which items should or should not be seized.

In *Lo-Ji Sales* this Court stated

> the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action.

442 U.S. at 325.

In *Stanford* this Court stated the often-quoted proposition that

> In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. See *Marcus v. Search Warrant*, 367 U.S. 717; *A Quantity of Books v. Kansas*, 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.

379 U.S. at 485.

The *Stanford* Court quoted the *Marron* opinion

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

275 U.S. at 196, 379 U.S. at 485. And in *Marcus* the Court stated

> The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted "obscene . . . publications."

367 U.S. at 732.

In short, the well-settled rule reinforced in these cases is that a warrant is not general if the searching officers

are left no discretion to choose which items should or should not be seized. In the instant case, the officers were left no discretion by the warrant. The warrant stated that the officers should seize magazines containing depictions of specifically described sexual acts which the judge had determined to be obscene under the guidance of this Court's determination that such acts are examples of obscenity. *Miller v. California*, 413 U.S. 15 at 25 (1973). The officers could not seize magazines that did not contain those acts. Simply put, the officers had to act as the warrant directed. Thus, this Court's well-established rule regarding general warrants is completely dispositive of this issue and, therefore, there is no reason for this Court to grant certiorari to hear this claim. A grant of certiorari on this issue would needlessly repeat this time-tested rule while serving only to review the alleged errors in this case alone. Therefore, this Court should refuse to hear this claim.

Clearly, petitioner's allegations raise concerns extensively dealt with by this Court. Review of this cause would not contribute to the development of the relevant areas of law in any new or significant way. Thus, it is clear that the petition does no more than seek intervention by this Court to correct alleged errors in this cause alone. Therefore, certiorari should be denied.

B. There Is No Conflict Between The First And Ninth Circuits And The Illinois Appellate Court.

Petitioner's claim that there is conflict between the First and Ninth Circuits and the Illinois Appellate Court does not withstand scrutiny.

In regards to Petitioner's probable cause and prior restraint arguments, there is no conflict between the courts. First, the two Federal Circuit Court of Appeals cases that Petitioner cites were decided before this Court's decision in *New York v. P.J. Video, Inc.*, ____ U.S. ____, 106 S.Ct.

1610 (1986), and, therefore, those decisions cannot be used as representative of the First and Ninth Circuits' positions on the subjects of probable cause and prior restraint relating to obscenity cases. Second, the two cases cited by Petitioner cannot be read as contrary to the principles set out in *P.J. Video*. Third, both circuits have cited and applied *P.J. Video*. *United States v. Diamond*, 808 F.2d 922 (1st Dist. 1987). This decision has been withdrawn pending rehearing en banc. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987); *United States v. McQuisten*, 795 F.2d 858 (9th Cir. 1986); *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986), *U.S. appeal filed*. Thus, since the First and Ninth Circuits have cited and applied *P.J. Video* and have not ruled contrary to *P.J. Video* and since the Illinois Appellate Court has cited and applied *P.J. Video* in *People v. Sequoia Books, Inc.*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987), Petitioner is in error when he claims that the courts disagree on the principles discussed in *P.J. Video*.

Also, there is no conflict between the courts regarding the general warrant issue. First, the First and Ninth Circuit cases cited by Petitioner cite and apply cases from the above-discussed line of cases that sets forth this Court's well-established general warrant rule. *United States v. Guarino*, 729 F.2d 864, 866-868 (1st Cir. 1984); *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). Second, both circuits have recently cited and applied the relevant principles from cases out of the above-discussed line. *E.g.*, *United States v. Guarino*, 729 F.2d 864, 866-868 (1st Cir. 1984); *United States v. Hale*, 784 F.2d 1465, 1469 (9th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 110 (1987). Third, the Illinois Appellate Court has recently cited and applied the relevant principles from cases out of the above-discussed line. *E.g.*, *People v. Sequoia Books*,

Inc., 145 Ill. App. 3d 1054, ____, 495 N.E.2d 1292, 1297 (2nd Dist. 1986), *cert. denied*, No. 86-1261 (U.S. Sup. Ct. May 18, 1987). Thus, since the First and Ninth Circuits and the Illinois Appellate Court each cite and apply the relevant principles from cases out of the above-discussed line, Petitioner is in error when he claims that the courts disagree on the general warrant rule.

In short, there is no conflict between the Illinois interpretation and the First and Ninth Circuits' interpretations of this Court's decisions and, therefore, the petition should be denied.

CONCLUSION

Because petitioner has not presented a federal question worthy of plenary review by this Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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